Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

ARKANSAS RIGHT TO LIFE STATE POLITICAL ACTION COMMITTEE, and DAVID SLOAN,

Petitioners,

v.

BRAD BUTLER, State Attorney for Benton County, Arkansas; TROY BURRIS, Chairman and Member of the Arkansas Ethics Commission; RITA LOONEY, Member of the Arkansas Ethics Commission; BEN ALLEN, Member of the Arkansas Ethics Commission; JACK KEARNEY, Member of the Arkansas Ethics Commission; and TOM ALEXANDER, Member of the Arkansas Ethics Commission; all in their official capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS DEALT WITH HEREIN

1. Did the Eighth Circuit err by joining the Ninth Circuit in adopting the premise that the good faith of official capacity state defendants is a "special circumstance" that renders an award of attorney's fees under §1988 "unjust," in contrast to the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits which hold that a defendant's good faith is *not* a factor in determining a §1988 fee award?

2. Does the fact that an unconstitutional state law is created by ballot initiative, when combined with the ordinary circumstance of governmental defendants' good faith, constitute "special circumstances" justifying the complete denial of attorney fees under §1988 to a prevailing §1983 plaintiff?

3. To justify the complete denial of §1988 fees as "unjust" to a prevailing §1983 plaintiff, may a court find "special circumstances" from the "totality" of a combination of factors, none of which by themselves constitute a "special circumstance"?

4. Should this Court exercise its supervisory authority, vacate the judgment of the court below, and remand for findings and conclusions or other articulation of the "special circumstances" present which justify the complete denial of §1988 fees, necessary to allow meaningful review and in accordance with *Hensley v. Eckerhart*?

LIST OF PARTIES

The names of all defendants-appellants to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case. There is no parent or subsidiary company of any party that is listed.

Petitioners believe the following intervenors as defendants-appellants in the court below have no interest in the outcome of the petition: Genevieve Stewart; Paul Kelly; Association of Community Organizations for Reform Now Political Action Committee; and Local 100, Service Employees International Union Political Action Committee.

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Rose v. Nebraska, 748 F.2d 1258 (8th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985) 15

Russell v. Burris, 146 F.3d 563 (8th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3332 (Nov. 17, 1998) 1

Supreme Court of Virginia v. Consumers Union of the U.S., Inc., 446 U.S. 719 (1980) 6, 8, 10

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Brian Buckley, *Washington Courts Get Stingy: Improper Denial of Attorney's Fees Under 42 U.S.C. §§1983 and 1988*, 70 Wash. L.Rev. 491 (1995) 7

Richard B. Collins and Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 Univ. of Colo. L.Rev. 47 (1995) 18, 25

Cynthia L. Fountaine, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. Cal. L.Rev. 733 (1988) 19

Elizabeth R. Leong, *Ballot Initiatives and Identifiable Minorities: A Textual Call to Congress*, 28 Rutgers L.J. 677 (1997) 19

Hans A. Linde, Practicing Theory: The Forgotten Law of Initiative Lawmaking, 45 U.C.L.A. Rev. 1735 (1998) 20

David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 Univ. of Colo. L.Rev. 13 (1995)..... 18, 20, 23

Frank I. Michelman, *Protecting the People From Themselves, or How Direct Can Democracy Be?*, 45 U.C.L.A. L.Rev. 1717 (1998) 19

Abner J. Mikva, *Initiative and Referendum: Better in Theory*, 146 New Jersey L.J. 27 (1996) 19

Daniel M. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves; the Use and Abuse of Initiative and Referendum, a Local Government Perspective*, 19 Seattle Univ. L.Rev. 47 (1995) 19

PETITION FOR A WRIT OF CERTIORARI

Petitioners Arkansas Right To Life State Political Action Committee (ARLSPAC) and David Sloan, respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS BELOW

The unreported order of the court of appeals denying petitioners an award of attorney's fees is reproduced in the Appendix filed herewith ("App.") at App. A. The unreported order of the court of appeals denying the petition for rehearing with a suggestion for rehearing en banc is reproduced at App. D. The opinion of the court of appeals making petitioners prevailing parties is reported at 146 F.3d 558 (8th Cir. 1998), and is reproduced at App. B. The opinion refers to the companion case of *Russell v. Burris* where the Eighth Circuit set out its reasons for striking down portions of Arkansas Initiated Act I of 1996 ("Act I") and is reported at 146 F.3d 563 (8th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3332 (Nov. 17, 1998), and is reproduced at App. C. The unreported order of the court of appeals denying an award of attorney's fees to the prevailing parties in the companion case of *Russell v. Burris* is reproduced at App. E.

STATEMENT OF JURISDICTION

The court of appeals filed its decision denying attorney fees on August 18, 1998. App. A. ARLSPAC and Sloan timely filed a petition for rehearing. The court of appeals denied this petition on September 29, 1998. App. D. ARLSPAC and Sloan invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Civil Rights Attorney's Fees Act of 1976, Pub.L. 94-559, 90 Stat. 2641, as set forth in Title 42 U.S.C. §1988 states:

> . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

A. Introduction

This petition arises from the complete denial of attorney's fees to successful plaintiffs in an action brought under Title 42 U.S.C. §1983. The district court ruled in plaintiffs' favor on their challenge to a state restriction on First Amendment rights of political speech enacted by popular initiative. All defendants appealed. Plaintiffs were completely successful in defending on appeal the decision of the district court in favor of plaintiffs. Thereafter, plaintiffs sought an award of fees for their appellate work, *pendente lite*, under Title 42 U.S.C. §1988 from the Eighth Circuit Court of Appeals.

The court of appeals denied *outright* the motion for attorney's fees. In so doing, the court did not set forth its findings, reasoning, or explanation *other than* by bare citation to a decision of the United States District Court for the Western District of Washington: *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D.Wash. 1994), *aff'd sub nom, Thorsted v. Munro*, 75 F.3d 454 (9th Cir. 1996) (*per curiam*).

In *Thorsted*, the district court completely denied §1988 fees to successful plaintiffs premised upon a finding of "special circumstances." The primary distinguishing characteristic of both the case below and the *Thorsted* case is that each case presented a challenge to initiative-based statutes that impinged on constitutional rights and in each case the defendants acted in good faith. Consequently, this case questions the jurisprudential underpinnings for singling out initiative cases, and initiative cases where the governmental defendants act in good faith, as new categories for completely denying §1988 attorney's fees.

Unconstitutional infringements on political speech and debate place at risk every citizen's rights, and more fundamentally, our democratic form of government. By denying attorney's fee awards in cases involving laws created by popular initiative, especially where, as here, such laws impinge on First Amendment rights of political speech, the risk of public harm is greatly elevated. At the same time, the complete denial of attorney fees for these cases effectively insulates from judicial review those unconstitutional statutes brought about by the initiative process. The reason, of course, is that plaintiffs in initiative cases are in little better position to afford litigation than plaintiffs in other civil rights cases. Consequently, it is still true that "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, (1968).

Thus, the propriety of excepting from §1988 fee awards, impingements on First Amendment rights

brought about by the initiative process and where the defendants have acted in good faith, is a question of exceptional importance.

B. Facts

In November 1996, Arkansas voters passed by a wide margin a campaign finance reform initiative known as "Act I." ARLSPAC is an Arkansas political action committee formed to support pro-life candidates seeking election to state office. David Sloan is a resident of Arkansas who likewise intends to support pro-life candidates for state office.

Act I dramatically lowered the dollar limits of allowable contributions to candidates for state office from $1,000 to $300 for gubernatorial and state-wide candidates and from $1,000 to $100 for legislative candidates. ARLSPAC and Sloan brought a pre-enforcement facial challenge to the contribution limits pursuant to §1983 on the basis that the lowered limits constituted an unjustified restriction on their First Amendment rights of political speech and association. On summary judgment, the district court agreed and struck down the $300 limits for guberratorial candidates (granting injunctive relief and reserving the remaining questions for trial). Defendants and intervenors appealed. The court of appeals affirmed the district court decision in all respects giving the plaintiffs a complete victory on the issues appealed. App. B. In a companion case, *Russell v. Burris*, the court of appeals set out its reasons on the merits for striking down various provisions of Arkansas' Act I. App. E.

Thus, plaintiffs were prevailing parties for purposes of entitlement under §1988.[1] *Hewitt v. Helms*, 482 U.S. 755 (1987).

As prevailing parties, ARLSPAC and Sloan (as well as the successful plaintiffs in *Russell*) then requested from the court of appeals an award of §1988 fees, *pendente lite*,[2] for work performed defending the appeal.[3] The court of appeals *without explanation* denied the §1988 fee request citing only the Western District of Washington decision in *Thorsted v. Gregoire*. App. A. Appellate §1988 fees were likewise denied to the prevailing parties in *Russell v. Burris*, in identical fashion. App. E. While *Thorsted* denied fees because it found seven separate factors constituting "special circumstances" which it decided would have made an award of fees unjust, the court of appeals in the case below neither identified what circumstances were special, nor why such circumstances would make the ordinary award of attorney's fees unjust.

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[1] The court of appeals also affirmed the district court's ruling in *Arkansas Right to Life State Political Action Committee v. Butler*, 983 F. Supp. 1209 (W.D. Ark. 1997), holding that ARLSPAC and Sloan possessed Article III standing. Following the appeal, plaintiffs were granted judgment in their favor on all of the contribution limit claims (Order of the District Court dated July 15, 1998) as well as their three remaining claims which addressed issues unreached by the Eighth Circuit in *Russell* (Order of the District Court dated December 8, 1998).

[2] *Hanrahan v. Hampton*, 446 U.S. 754, 757-58 (1980).

[3] According to Rule 47C of the Eighth Circuit Rules of Appellate Procedure, motions for attorney's fees for work done on appeal are to be brought before the court of appeals in the first instance. *Little Rock School District v. Arkansas*, 127 F.3d 693, 696-697 (8th Cir. 1997).

REASONS FOR GRANTING THE WRIT

I. Introduction

This petition is about the *ordinary presumption of entitlement* to attorney's fees under §1988 for prevailing plaintiffs in constitutional litigation and the narrow exception for "special circumstances" that would make an award of fees unjust. The outright fee denial below was incorrect because there were no circumstances which previous courts had considered to be "special circumstances."

This is *not* a case about the formula employed or the reasonableness of the amount awarded under §1988, as was the case in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Blanchard v. Bergeron*, 109 S. Ct. 939 (1989). *Neither* is this a case about plaintiff's prevailing party status or whether plaintiffs' success was "limited." *E.g., Harahan v. Hampton*, 446 U.S. 754 (1980); *Farrar v. Hobby*, 113 S. Ct. 566 (1992). Plaintiffs' success was complete. *Nor* is this a case about the timeliness or the proper mechanics for requesting an attorney's fee award. *E.g., Blum v. Stenson*, 465 U.S. 886 (1984). Plaintiffs' request was timely and proper in all respects.

As this Court pointed out, "a prevailing plaintiff 'should *ordinarily* recover an attorney's fee unless special circumstances would render such an award unjust.' " *Hensley*, 461 U.S. at 429 (quoting S.Rep. No. 94-1011, p. 4 (1976), U.S. Code Cong. & Admin. News 1976, p. 5912 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)) (emphasis added). That fee awards would be routine was again recognized in *Supreme Court of Virginia v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 738 (1980), where this Court wrote "enforcement authorities against whom §1983 judgments have been entered would *ordinarily* be charged with attorney's fees." (Emphasis added). So routine has the awarding of §1988 fees against

official capacity defendants become, that this Court has simply described such events as "run-of-the-mill occurrences." *Id.* at 739. Section 1988 fee awards to successful civil rights plaintiffs are now a "well established cornerstone of federal attorney fees policy." *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1232 (10th Cir. 1997). Prior to the recent twin decisions of the Eighth Circuit following the decision of the Ninth Circuit in *Thorsted*, cases denying fee awards based on the narrow "special circumstances" exception have been rare.[4]

More to the point, *no court* had singled out initiative cases for denying §1988 fees, or initiative cases where the defendants acted in "good faith," until the decision in *Thorsted*,[5] and *no court* had followed *Thorsted* and denied fees until the decision under review here.

Thorsted, and thereby the Eighth Circuit's decision, is problematic for three principal reasons. *First*, it relies on several instances of the official capacity defendants' "good faith" as "special circumstances" warranting the denial of §1988 fees. In so doing, it departed from the teaching of this Court and created a conflict with every other circuit court of appeals. *Second*, it singles out for the denial of §1988 fees, cases involving statutes enacted by popular initiative. In penalizing initiative cases, it completely departed from prior decisions involving "special

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[4] *Dahlem v. Board of Education of Denver Public Schools*, 901 F.2d 1508, 1514 (10th Cir. 1990) ("There are few cases denying attorney fees to a prevailing party as unjust under §1988."); *Tyler v. City of Manhattan*, 866 F. Supp. 500, 501 (D.Kan. 1994) ("The special circumstances cases are rare and tend to involve highly unusual conditions.").

[5] *See generally* Brian Buckley, *Washington Courts Get Stingy: Improper Denial of Attorney's Fees Under 42 U.S.C. §§1983 and 1988*, 70 Wash. L.Rev. 491 (1995) (discussing *Thorsted*).

circumstances" cases and its own decisions in initiative cases. *Third,* it approved of an unprincipled and illogical "totality of the circumstances" test which permits building together "special circumstances" out of a combination of many factors, none of which are individually special. In accepting the "totality of circumstances" approach, it joined the Ninth Circuit's conflict with the Fourth Circuit.

The practical effect of the Eighth and Ninth Circuit decisions will be to discourage private citizens from challenging initiative-made laws. That result is contrary to the congressional purpose behind §1988. More importantly, the result tends to insulate from judicial scrutiny unconstitutional restrictions put in place by popular ballot initiatives. Governmental officials will normally exercise "good faith" in defending these laws. Yet, initiative-made legislation is a growing area where citizen suits may be needed most. Initiatives are an increasingly favored means of enacting popular mood legislation. But laws created by initiative are especially susceptible to impinging on citizens' constitutional rights. Particularly in the realm of campaign finance "reform," ballot initiatives are both common and commonly problematic.

II. The Eighth and Ninth Circuit Decisions Treating the "Good Faith" of Official Capacity State Defendants as a "Special Circumstance" Depart from this Court's Prior Decision in *Supreme Court of Virginia v. Consumers Union* and Create a Split From All of the Other Circuits

A. The Eighth Circuit Order Under Review Implicitly Adopted a *Per Se* Rule for Initiative Cases Where the State Defendants Act in "Good Faith"

By citing to, and relying on, the *Thorsted* decision, the Eighth Circuit implicitly adopted *Thorsted*'s "special

circumstances" as its basis for denying plaintiffs any fee award pursuant to §1988 in the case below. The seven *Thorsted* factors, when properly understood, describe circumstances with two important elements common to both that case and the case below: (1) an initiative-created law; and (2) the presence of the "good faith" of the official capacity defendants.[6] In other words, *Thorsted* and

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[6] The seven *Thorsted* factors were listed in that case, and are quoted below for ease of reference:

> 1. No award is needed to serve the purpose of Section 1988, which is to assure 'effective access to the judicial process.' This is not a typical civil rights case. The mere filing of suit by anyone with standing would have assured a full court test. *See* the briefs amicus curiae, which demonstrate this.
>
> 2. No relief has been won under the Section 1983 claims beyond that already awarded under the constitutional claims.
>
> 3. The legislation that prompted the suit was adopted by a voter's initiative, not by State officials. The deterrence purpose of Section 1983, is inapplicable.
>
> 4. The defendant officials have not yet enforced Initiative 573. Their willingness to do so if it is upheld reflects only the minimum their oaths of office require.
>
> 5. The State officials have acted in good faith. 'The Ninth Circuit has ruled that a defendant's good faith is one factor of several that a court may consider in applying the Attorney's Fees Act.'
>
> 6. This is a case of first impression in federal court, and the public interest requires that it be adjudicated through the full adversary process. The State defendants have done nothing to increase the litigation costs beyond what would have been necessary in any event.

(by implication) the Eighth Circuit now hold that where the unconstitutional law is the result of a ballot initiative, and the official capacity defendants have acted in "good faith," "special circumstances" exist making an award of attorney's fees unjust. However, but for the newly minted "special circumstance" of initiative-based laws, what is functionally left from the *Thorsted* list of factors are tired and discredited "good faith" factors.

B. Treating Official Capacity Defendants' "Good Faith" as a "Special Circumstance" is a Direct Departure from Existing Law and a Split from the District of Columbia, First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits.

As will be shown, this Court has observed, and every other circuit has held, that the "good faith" of official capacity defendants responsible for enforcing the challenged law, does *not* amount to "special circumstances."

In *Supreme Court of Virginia v. Consumers Union*, this Court reversed a trial court finding of "special circumstances" noting that it would have been fair to award fees notwithstanding an official capacity defendant's "good faith." 446 U.S. at 729 and 739; *see also Hutto v. Finney*, 437 U.S. 678, 693 (1978).

> 7. There was no way for the State officials to settle the case by agreement. Even if a stipulation of unconstitutionality had been entered (a most unlikely event), the court would have rejected it. State legislation is presumed constitutional until the contrary is shown.

Thorsted, 841 F.2d at 1084 (citations omitted).

Likewise, the First Circuit recently explained, "the good faith of defendants is not a controlling factor in determining whether or not plaintiffs merit an award. . . . The key issue is the provocative nature of the plaintiff's lawsuit, not the motivations of the defendant." *Williams v. Hanover Housing Authority*, 113 F.3d 1294, 1301 (1st Cir. 1997). *Williams* goes on to note, "[t]he circuits are in agreement, however, that defendants' good faith reliance even on settled law . . . is not a "special circumstance" warranting a denial of attorneys' fees under §1988." *Id.*; *Cheyenne Mountain*, 124 F.3d at 1233 ("the alleged special circumstances amount to no more than assertions that the defendant acted in good faith, *a ground overwhelmingly rejected by the courts*") (emphasis added). All of the other circuits have similarly held that the "good faith" of a government defendant does not qualify as "special circumstances" making an award of §1988 fees unjust.[7]

C. Except for the Initiative-law Factor, All of the Individual "Special Circumstances" in *Thorsted* Have Been Dismissed by Other Courts as an Insufficient Basis for Denying §1988 Fees

Other than the fact that the challenged law was adopted by ballot initiative, all of *Thorsted*'s remaining six

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[7] *See Miller v. Staats*, 706 F.2d 336, 343 (D.C. Cir. 1983); *Rose v. Heintz*, 806 F.2d 389, 391-92 (2nd Cir. 1986); *Burney v. Housing Authority*, 735 F.2d 113, 117 (3rd Cir. 1984); *American Booksellers Ass'n v. Commonwealth of Virginia*, 802 F.2d 691, 697 (4th Cir. 1986); *Espino v. Besteiro*, 708 F.2d 1002, 1005 (5th Cir. 1983); *Haycraft v. Hollenbach*, 606 F.2d 128, 132 (6th Cir. 1979); *Lampher v. Zagel*, 755 F.2d 99, 104-05 (7th Cir. 1985); *Martin v. Heckler*, 773 F.2d 1145, 1150 (11th Cir. 1985) (en banc).

factors have been disqualified for denying §1988 fees to a successful civil rights plaintiff.

For example, *Thorsted*'s first factor, that "[n]o award is needed to serve the purpose of Section 1988, which is to assure 'effective access to the judicial process,' " flatly cuts against Congress' primary rationale for amending §1988 to allow fee awards.[8] *See* Part IIIB, *infra*.

The second factor relied on by *Thorsted* – that "[n]o relief had been won under the §1983 claims beyond that already awarded under the constitutional claims" – has been disposed of by this Court in *Maher v. Gagne*, 448 U.S. 122, 132-33 & n.15 (1980) and the Eighth Circuit in its own recent decision of *Goss v. City of Little Rock*, ___ F.3d ___, 1998 WL 459858 (8th Cir. Aug. 10, 1998). *Goss* explained,

> [Section] 1983 establishes a means by which people can enforce the Constitution. . . . "[T]he fact that a party prevails on a ground other than §1983 does not preclude an award of attorney's fees under §1988. If §1983 would have been an appropriate basis for relief, then the plaintiff is entitled to attorney's fees under §1988 even though relief was actually awarded on another ground."

Id. at *4-5 (noting the Second and Sixth Circuits are in agreement). Plainly, what *Thorsted* identified as a second factor for denying fees is not really a "special circumstance" at all.

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[8] This holds true even if the district court meant by this that the *Thorsted* plaintiffs had an ability to pay for their litigation. That basis has also been rejected as "special circumstances." *E.g., Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990); *Hastert v. Illinois State Board of Election Commissioners*, 28 F.3d 1430, 1443 (7th Cir. 1993) (plaintiffs were elected officials).

The third factor is the ballot initiative factor.

Factors four, five, six, and seven are either explicitly, or implicitly, reformulated "good faith" factors which have been roundly rejected by this Court, and the several courts of appeals. *E.g., Bond v. Stanton*, 630 F.2d 1231, 1235-36 (7th Cir. 1980) ("[A]rgument . . . is in reality no more than a thinly veiled attempt to smuggle an exemption for good faith, authoritatively excised from the Act by the Supreme Court in *Hutto v. Finney*, back into fee determinations made under the Act.").

For example, *Thorsted*'s fourth factor, that "defendant officials have not yet enforced" the challenged law and presumably demonstrated their "good faith" thereby, has been rejected by the Tenth Circuit in *Phelps v. Hamilton*, 120 F.3d 1126, 1130 (10th Cir. 1997) and the Eleventh Circuit in *Council for Periodical Distributors Ass'ns v. Evans*, 827 F.2d 1483, 1486 (11th Cir. 1987) (cases are relatively common in which government official is liable for attorney's fees, even where the official took no active steps to enforce statute).

Thorsted's fifth factor, which explicitly relies on "good faith" as a special circumstance, has been flatly rejected as a basis for denying §1988 fees. *See* Part IIB, *supra*.

In another reformulation of the "good faith" argument, *Thorsted*'s sixth factor, (*i.e.*, the suit presents "a case of first impression in federal court"), has not only been rejected by several courts of appeals (including the Ninth Circuit) but actually counsels in favor of an increased award. *See Cheyenne Mountain*, 124 F.3d at 1233 ("Even if the issue were novel, that is not a valid basis for denying an award of attorney fees. Indeed, until relatively recently that would have been . . . a permissible ground

for *increasing* the lodestar fee."); *American Booksellers Ass'n v. Commonwealth of Virginia*, 802 F.2d at 697; *Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524, 1531 (11th Cir. 1983); *Teitelbaum v. Sorenson*, 648 F.2d 1248, 1250 (9th Cir. 1981) ("Actions based on novel legal theories generally require greater attorney effort . . . This effort, in turn, may pay later dividends in ensuring the previously unprotected classes receive the benefit of rights that the Constitution or statutes guarantee.").

Thorsted's seventh and final factor is also a reformulated "good faith" argument. The fact that "there was no way for the state officials to settle the case by agreement," is in essence an argument that the state officials were forced by statute to defend the law and thus, did so in "good faith." It also bears noting that the defendants in the case below never discussed settlement. That official capacity defendants were required to defend a challenged law has been rejected as "special circumstances" by the First and Fifth Circuits. *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 602 (1st Cir. 1982) (state law required defendants – under threat of criminal sanctions – to contest suit); *Johnson v. State of Mississippi*, 606 F.2d 635, 637 (5th Cir. 1979) (defendants "merely performing their duty by enforcing the statute").

D. None of the Reported Cases from the Courts of Appeals have Heretofore Singled Out *Initiative* Cases for Denying §1988 Fees

There are only a handful of reported cases from the circuit courts in which "special circumstances" of any type have sufficed as a basis for denying §1988 fees. Yet, in spite of all of the initiative measures that have been struck down over the past two decades, only the Eighth

and Ninth Circuits have identified as a "special circumstance" the unique fact that a challenged law was adopted by ballot initiative.

Rather, in the rare cases where fees have been denied to successful plaintiffs, the "special circumstances" identified have involved unusual contexts, *inter alia:* (a) private injury cases with potential damages awards sufficiently large to attract counsel;[9] (b) large state settlement offers rejected by the plaintiffs;[10] (c) multiple defendants where another defendant is more liable;[11] (d) defendants who neither enforce nor defend the challenged law;[12] (e) successful outcomes that were fortuitous;[13] (f) successful outcomes that were not the product

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[9] *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (where plaintiff sued for, and was awarded, $141,000 in damages, prospects of success were sufficiently bright to attract competent counsel on a contingent fee basis).

[10] *Annu... to v. The Gan, Inc.*, 744 F.2d 244, 254 n.4 (2nd Cir. 1984) (defendant an innocent third party and its full settlement offer rejected).

[11] *Rose v. Nebraska*, 748 F.2d 1258, 1264 (8th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985) (no good reason for state governor to be defendant while enforcement officials also defendants).

[12] *Daggett v. Kimmelman*, 617 F. Supp. 1269, 1278-79 (D.N.J. 1985), *aff'd in part and remanded on other grounds*, 811 F.2d 793, 795 n.1 (3rd Cir. 1987) (state defendants for the most part neither enforced nor defended reapportionment plan).

[13] *Dahlem v. Board of Education of Denver Public Schools*, 901 F.2d 1508, 1514 (10th Cir. 1990) (only a "fortuity" prevented plaintiff's case from being reversed); *Love v. Deal*, 5 F.3d 1406, 1410 (11th Cir. 1993) (plaintiff challenged antiquated and rarely enforced law and not instrumental in achieving remedy sought); *Aho v. Clark*, 608 F.2d 365, 367 (9th Cir. 1979) (settlement agreement made no provision for fees and Attorney's Fees Act not in effect until four months after suit began).

of counsel's litigation efforts;[14] and (g) successful outcomes won in spite of counsel's questionable conduct.[15]

The only new "special circumstance" is *Thorsted*'s third factor: *i.e.*, the challenged legislation was enacted by popular *initiative*. This "initiative" factor, apparently seized upon by the Eighth Circuit in its rulings following *Thorsted*, has never before been the basis of a "special circumstances" fee denial in any court.[16]

III. Carving Out Initiative-created Legislation as a "Special Circumstance" Justifying a Complete Denial of §1988 Fees to a Prevailing §1983 Plaintiff Fosters an Intolerable Condition Stifling "Citizen Attorney General" Action, in a Complete Departure from Prior Case Law and in Contravention of the Congressional Purposes Behind §1988

Admittedly, it is difficult to discern the Eighth Circuit's reasons for denying plaintiffs in this case (as well as the plaintiffs in *Russell*) an attorney's fee

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[14] *U.S. v. 27.09 Acres of Land*, 43 F.3d 769, 773 (2nd Cir. 1994) (fees sought were incurred only in the *un*successful first (of two) phase of litigation); *Cooper v. Dupnik*, 924 F.2d 1520, 1537 n.32 (9th Cir. 1991), *rehearing granted*, 933 F.2d 798, *on rehearing* 963 F.2d 1220 (counsel failed to provide court with analysis of governing case law); *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988) (inadequate briefing); *Robins v. Harum*, 773 F.2d 1004, 1011 (9th Cir. 1985) (inadequate briefing).

[15] *Lewis v. Kendrick*, 944 F.2d 949, 956 (1st Cir. 1991).

[16] *See generally Love v. Deal*, 5 F.3d 1406, 1410 (11th Cir. 1993) (categorizing cases); *Riddell v. National Democratic Party*, 624 F.2d 539, 544-45 (5th Cir. 1980) (categorizing cases).

award.[17] However, by examining the similarities between the instant case and the *Thorsted* case cited by the court of appeals, it is obvious that both involved §1983 challenges to the constitutionality of laws brought about by popularly-enacted initiatives.

In *Thorsted*, it was Washington Initiative 573 (a congressional term limits law). In the instant case it was Arkansas Act I (a comprehensive campaign finance "reform" scheme). Both initiatives operated in an area affected with fundamental issues of importance to our representative form of government. *Thorsted*, 841 F. Supp. at 1071; *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities").

Yet, in both the Eighth and Ninth Circuits, initiative-based legislation has been singled out for derogatory treatment under §1988 in spite of the fact that both are treated similarly for purposes of §1983. For "voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981).

In view of the increasing popularity of lawmaking by ballot initiative, and due to the heightened potential for unconstitutional infringement from ballot initiatives (discussed below), whether ballot initiative cases as a category constitute the "special circumstances" envisioned by

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[17] For precisely this reason, plaintiffs ask this Court to (at least) exercise its supervisory authority and vacate and remand to the court of appeals for "a concise but clear explanation" for completely denying fees, as commanded in *Hensley*, 461 U.S. at 437. *See* Part V, *infra*.

this Court in *Newman v. Piggie Park* for denial of §1988 fee awards is an issue of exceptional importance.

A. Legislation by Ballot Initiative Is Growing More Popular in the Twenty-four States Which Have Such Process, Yet Are More Susceptible to Trenching on Citizens' Constitutional Rights

1. The Popularity of Ballot Initiatives

Twenty-four states authorize the use of initiatives for enacting direct legislation.[18] In those states the popularity of legislation by ballot initiative or referendum is growing. David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 Univ. of Colo. L.Rev. 13, 26-27 and fig.1 (1995) ("The initiative has experienced renewed use in several states since the mid-1970's. . . . It started to rise again in the 1970s and has increased in use since that time."). Following the success of California's popular tax-cutting Proposition 13 in 1978, "those states that already had the initiative or popular referendum experienced a dramatic increase in initiative activity." *Id.* at 17.

Legislation by ballot initiative has been particularly popular in the area of campaign finance "reform." For example, during this decade, campaign finance "reform" initiatives have been passed by popular vote in Arizona,

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[18] Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. Richard B. Collins and Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 Univ. of Colo. L.Rev 47, 49-50 & n.5 (1995).

Arkansas, California, Colorado, District of Columbia, Florida, Maine, Massachusetts, Missouri, Montana, Nevada, Oregon and Vermont.

Unfortunately, laws enacted by the initiative process historically have tended to be at odds with constitutional rights. Courts and scholars observe that lawmaking by ballot measure has numerous shortcomings tending toward unconstitutionality.[19] The Supreme Court of Washington has commented, "[i]t should be obvious that the electorate, *via* the initiative and direct legislation, can make serious, even grievous mistakes and errors in judgment regarding matters of basic social policy." *Fritz v. Gorton*, 517 P.2d 911, 916 (Wash. 1974) (en banc); *cf. Americans for Medical Rights v. Heller*, 2 F. Supp. 2d 1307, 1316 (D. Nev. 1998) ("This Court acknowledges that public perception and the will of the majority of voters . . . regarding Ballot Question 10 are important. However, the very purpose of the First Amendment to the United States Constitution is to protect the rights of all citizens to express political or religious views which may be at odds with the majority."). The "self-selected private lawmakers [of ballot initiatives] are 'the least accountable

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[19] *See generally* Frank I. Michelman, *Protecting the People From Themselves, or How Direct Can Democracy Be?*, 45 U.C.L.A. L.Rev. 1717 (1998); Elizabeth R. Leong, *Ballot Initiatives and Identifiable Minorities: A Textual Call to Congress*, 28 Rutgers L.J. 677 (1997); Abner J. Mikva, *Initiative and Referendum: Better in Theory*, 146 New Jersey L.J. 27 (1996); Daniel M. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves; the Use and Abuse of Initiative and Referendum, a Local Government Perspective*, 19 Seattle Univ. L.Rev. 47 (1995); Cynthia L. Fountaine, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. Cal. L.Rev 733 (1988).

branch' . . . free by design to make law in 'ignorance and self-deception.' "[20] "The only institutional checks on the excesses of direct legislation are the co .ts. . . . Between 1960 and 1980, only two successful California initiatives were not declared unconstitutional in whole or in part by state or federal courts."[21] "When it works well it can orient elected officials to the will of the people. . . . But carried to an extreme it has negative consequences for the political system and can undermine the very structure it is intended to supplement."[22]

Often minorities have been the target of initiatives, and the nature of the initiative process lends itself to lawmaking by tyrannous majorities. "Recent initiatives furnish many examples . . . [of the need for] protection of liberty and equality against oppression by majoritarian passions."[23] Some recent examples of unconstitutional lawmaking by ballot initiative would include: Arizona's Article XXVIII (*Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), *vacated as moot sub nom., Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997)); Colorado's Amendment 2 (*Romer v. Evans*, 517 U.S. 620 (1996)); Arkansas' Amendment 73 (*U.S. Term Limits, Inc. v. Thorton*, ___ U.S. ___, 115 S. Ct. 1842 (1995); and California's amendment to prevent enactment of fair housing laws banning racial discrimination (*Reitman v. Mulkey*, 387 U.S. 369 (1967)).

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[20] Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 U.C.L.A. L.Rev. 1735, 1744 (1998). Judge Linde writes as a Senior Judge of the Oregon Supreme Court.

[21] Magelby, 66 Univ. of Colo. L.Rev. at 40.

[22] *Id.* at 46.

[23] Linde, 45 U.C.L.A. L.Rev. at 1757.

2. Especially in the Area of Campaign Finance "Reform," Unconstitutional Initiatives Abound

Sponsors of campaign finance "reform" have been especially successful in employing the ballot initiative process to enact state election restrictions of questionable constitutionality. For example, ballot initiative statutes affecting political speech have been struck down as unconstitutional in: Arkansas (*Arkansas Right to Life v. Butler*, App. B and slip op., Case No. 97-5064 (W.D. Ark. Dec. 8, 1998), and *Russell v. Burris*, App. C (striking down portions of Act I)); California (*California ProLife Council v. Scully*, 989 F. Supp. 1282 (E.D.Cal. 1998) (appeal pending) (striking down Proposition 208)); Colorado (*Colorado Right to Life v. Buckley*, slip. op., Case Nos. 96-2844, 96-2973, 97-221 (D. Colo. Apr. 17, 1998) (striking down portions of Amendment 15)); the District of Columbia (*National Black Police Association v. District of Columbia Board of Elections*, 924 F. Supp. 270 (D.C.D.C. 1996), *vacated as moot*, 108 F.3d 346 (D.C. Cir. 1997) (striking down Initiative 41)); Missouri (*Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996) (striking down Proposition A)); Montana (*Montana Chamber of Commerce v. Argenbright*, slip op., Case No. 97-6-H-CCL (D. Mont. Oct. 1998) (striking down Initiative 125)); Nevada (*Americans for Medical Rights v. Heller*, 2 F. Supp. 1307 (D. Nev. 1998) (striking down Ballot Question 10); and Oregon (*Vannatta v. Keisling*, 151 F.3d 1215, (9th Cir. 1998) (striking down Measure 6); *Vannatta v. Keisling*, 931 P.2d 770 (Ore. 1997) (striking down Measure 9)).

B. The Purpose of §1988 is to Encourage "Private Attorney General" Action

Without the benefit of a fee shifting mechanism such as §1988, it was evident to Congress the enforcement of civil rights would be difficult. Thus, Congress chose to rely on private litigation as a means of securing broad respect of civil rights. As this Court observed, "[w]hen a plaintiff brings an action . . . [i]f he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park*, 390 U.S. at 402.

Petitioners in the case below are the type of plaintiffs which §1988 was intended to encourage.[24] Had they known at the outset that they would be required to bear their own attorney's fees, they (like many citizens) would not have been able to afford to vindicate their rights through the courts. Section 1988's fee-shifting provision was designed to overcome the financial barriers. This Court in *Newman* pointed out,

> If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore, enacted the provision for counsel fees – not simply to penalize . . . but, more broadly, to encourage individuals injured . . . to seek judicial relief.

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[24] ARLSPAC submitted a declaration to the Eighth Circuit in its petition for rehearing concerning its financial *in*ability to undertake this litigation without its counsel's willingness to proceed on the prospect of being paid through §1988.

Id.; *see also* S. Rep. No. 1011, at 2, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 ("All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.").

In *City of Riverside v. Rivera*, 477 U.S. 561, 574-576 (1986) (plurality opinion), this Court recognized that a civil rights plaintiff "often secures important social benefits" and taught that a plaintiff's success, for purposes of §1988, is at least in part, a function of the benefits that accrue to the public as a result of the suit. In the case below, and cases like it challenging unconstitutional infringements on political speech, the benefits that accrue to the public from a plaintiff's successful suit are, by any measure, significant benefits that accrue to the entire citizenry.

To paraphrase the Second Circuit in *Holley v. Lavine*, 605 F.2d 638, 646 (2nd Cir. 1979), *cert. denied*, 446 U.S. 913 (1980), because challenging popularly-passed campaign finance initiatives do not involve substantial monetary damages and are ones which many citizens would regard as unpopular, it is highly unlikely that plaintiffs could have retained other counsel to act on their behalf. "The cost of the litigation and the time and effort required by plaintiff's counsel . . . plainly [are] disproportionate to any sum the plaintiff might reasonably . . . expect[ ] to recover on her own behalf. All of these circumstances justify an award of fees to the plaintiff." *Id.*

C. The Effect of Treating Initiative Cases as "Special Circumstances" Cases for Denying Fees

The effect of treating initiative cases as, *per se*, "special circumstances" cases for denying fees under §1988 will likely be a broad unwillingness for all but the wealthy to bring court challenges to rectify constitutional encroachments on civil rights. As an additional side-effect, one can imagine legislators now turning to the initiative process to propose and enact constitutionally doubtful legislation that would not otherwise succeed in the ordinary deliberative legislative process. Notes author David Magleby,

> "[c]andidates for governor in California now regularly sponsor their own initiatives during their gubernatorial campaigns, as Pete Wilson's strong support of Proposition 187, *Illegal Aliens, Ineligibility for Public Services, Verification and Reporting*, illustrates. . . . State legislators have also turned to the initiative to promote issues that they cannot get passed in the legislature."[25]

While politicians may employ initiatives to increase voter attention for their own campaigns or to insulate state coffers from popular – but unconstitutional – laws, private initiative sponsoring groups sometimes have less laudatory goals. Opportunistic proponent groups "attempt[ ] not to convince a majority of the people of the correctness of a proposal, but to put language in the constitution, via clever issue matching or confusion and

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[25] 66 Univ. of Colo. L.Rev. at 29.

deception, which does not have the support of a majority of the electorate."[26]

In all events, here is the rub. Both legislators who would protect the public fisc from attorney fee awards for defective legislation, and opportunistic proponent groups seeking to insulate from attack their own self-interested legislation, have an inviting tool in the ballot initiative if aggrieved citizens must pay their own attorney's fees to mount a challenge. Certainly, in the realm of campaign finance "reform," where reformers often attempt only modest diminutions of constitutional rights at any one time, widespread constitutional impingements will likely go unrelieved if §1988 fees are not available for successful §1983 suits.

Consequently, the Eighth and Ninth Circuits' complete denial of §1988 fees in initiative cases threatens to open a large loophole through which much future unconstitutional legislation may pass. For this reason, this Court should grant the writ.

IV. By Combining Factors Which by Themselves Do Not Amount to "Special Circumstances" the Eighth and Ninth Circuits have Manufactured a Standard for Denying Fees, in Conflict with the Fourth Circuit, that Will Frustrate the Purpose of §1988 and Always Escape Meaningful Review

To escape from the ordinary obligation to award §1988 fees, the Eighth Circuit, implicitly, and the *Thorsted* court, in its opinion, set out to adduce several factors that would qualify as the "special circumstances" necessarily

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[26] R. Collins and D. Osterle, 66 Univ. of Colo. L.Rev. at 119 ("Occasions arise, however, when voters are overmatched by an opportunistic strategy used by a clever proponent.").

prerequisite to denying fees. Defendants' "good faith" alone was obviously insufficient for the task. This Court had already taught in *Christiansburg Garment Co. v. EEOC*:

> if the objective of Congress had been to permit the award of attorney's fees only against defendants who had acted in bad faith, "no new statutory provision would have been necessary," since even the American common-law rule allows the award of attorney's fees in those exceptional circumstances.

434 U.S. 412, 417 (1978) (*quoting Newman v. Piggie Park*, 390 U.S. at 402). Consequently, additional factors were identified and listed together.

According to the Ninth Circuit, the *Thorsted* decision presents seven factors which taken together in their "totality," constitute "special circumstances" making an award of fees unjust. However, as already discussed, closer analysis reveals that each of the factors, but one, have been dismissed by other courts of appeals as insufficient for denying fees. That many of the factors did not rise to "special circumstances" by themselves, was tacitly acknowledged by the Ninth Circuit in its affirmance where it explained,

> *several of the circumstances identified by the district court would be insufficient, standing alone, to warrant a denial of fees.* We hold, however, that the district court did not abuse its discretion by denying fees based on the totality of circumstances it identified.

Thorsted v. Munro, 75 F.3d at 456 (emphasis added).

The Eighth Circuit (implicitly), the Ninth Circuit, and perhaps the Fifth Circuit,[27] now apparently hold as a matter of law that §1988 fees may be denied to a successful §1983 plaintiff on the basis of a "totality of circumstances." *Thorsted v. Munro*, 75 F.3d at 456. According to the only court that has commented on the *Thorsted* "totality of circumstances" test, the test appears to allow the aggregation of individual circumstances which are insufficient, standing alone. *Morse v. Republican Party of Virginia*, 972 F. Supp. 355, 359 (W.D. Va. 1997) (citing *Thorsted v. Munro)* ("In determining whether special circumstances exist, a court may consider the totality of circumstances, so that *even though each justification for the denial of fees may not, on its own, support a finding of special circumstances, the sum total of the justifications may warrant a denial of fees.*") (emphasis added).

The Eighth, Ninth, and Fifth Circuits conflict with the Fourth Circuit, which rejects this "totality" of ordinary factors approach. In *American Booksellers*, the appeals court noted that the district court denied fees based upon an agglomeration of individual factors including defendant's "good faith." 802 F.2d at 697. In describing the district court's approach, the Fourth Circuit observed,

> [t]he [district] court recognized that none of these factors alone would constitute the necessary special circumstances to justify the denial of attorneys' fees. It held, however, that "with all these factors combined, the Court finds it more equitable to let the costs lie where they land."

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[27] *See Ellwest Stereo Theatre, Inc. v. Jackson*, 653 F.2d 954, 955 (5th Cir. 1981) ("None of the circumstances relied upon by the district court, either individually or collectively, amount to special circumstances justifying a denial of attorneys' fees").

Id. The Fourth Circuit, holding that there is no authority for such an approach, reversed and remanded. *Id.*

The "synergistic" equation of *Thorsted* leaves itself open to criticism. It is an unprincipled, unrestrained approach for denying fees and permits the frustration of the purpose behind §1988. The ability to describe any number of factors, each insufficient on its own, and then conclude that the "totality" of the factors warrants denying fees, is well within the capability of any court in any §1983 action. However, the agglomeration approach fosters unprincipled departures from the "ordinary rule" that fees should be awarded to successful plaintiffs in order to encourage "citizen attorney general" actions. The reason why is that the "totality of circumstances" equation provides no guidance and no boundaries. As a result, a denial of fees based upon a "totality" of ordinary factors will always escape meaningful review. The continuum of ordinary factors is always infinite. Yet, there is no identifiable point on the continuum at which insufficient ordinary factors finally build up to constitute extraordinary circumstances.

Because of the split in the courts of appeals, and because the "totality" approach frustrates the purposes behind §1988, and because the "totality" method is unprincipled and will always escape meaningful review, this Court should grant the writ.

V. This Court Should Exercise its Supervisory Authority, Vacate the Judgment of the Eighth Circuit and Remand for Reasons to Allow Meaningful Review, in Accordance with *Hensley v. Eckerhart*

In *Hensley v. Eckerhart*, this Court counseled (in terms equally applicable to the Eighth Circuit when it considers

a fee request presented to it in the first instance), that "it remains important" for a court "to provide a concise but clear explanation of its reasons for the fee award." 461 U.S. at 437.

The Eighth Circuit, itself, notes that because the text of §1988 does not include the "special circumstances" exception, the exception should be narrowly construed, and "a strong showing of special circumstances is necessary to support a denial of attorney fees." *Hatfield v. Hays*, 877 F.2d 717, 720 (8th Cir. 1989). *Hatfield* reversed and remanded to award fees in a case where the district court "did not explain . . . why these circumstances would make an award of attorney's fees unjust," saying "the injustice, if any, is not readily discernible." In the order under review, however, the Eighth Circuit did precisely that for which it correctly criticized a lower court, *i.e.*, it did not identify the special circumstances making an award of §1988 fees unjust or explain why the (unidentified) circumstances were "special." *See* App. A.

The important policy reasons mandating an explanation where fee entitlement is denied have been described as necessary for "minimum standards of procedural fairness" and to allow "a disciplined and informed review." *Burke v. Guiney*, 700 F.2d 767, 771 (1st Cir. 1983). The First Circuit reflected,

> We have held that summary denial of entitlement to attorney's fees without hearing and without an adequate statement of reasons for the order *does not meet minimum standards of procedural fairness and regularity*. Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow

> for a *disciplined and informed review* of the court's discretion.

Id. (emphasis added); *see also Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94, 99 (2nd Cir. 1997). In the instant case (as well as the *Russell* case), the court of appeals' order denying §1988 fees did not set forth a "clear explanation" or an "adequate statement of its reasons" or otherwise make a "strong showing of special circumstances." With nothing more than its bald citation to the problematic *Thorsted* decision, the court's order below does not meet minimum standards of procedural fairness and does not allow for a disciplined or informed review of its decision.

Consequently, it is necessary for this Court to grant the writ, exercise its supervisory authority, vacate the order of the Eighth Circuit, and remand for a clear explanation and adequate statement of its reasons.

VI. CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 98-1215/1218WAF

Arkansas Right to Life Political Action Committee; David Sloan,	*	**Appeal from the United States District Court for the Western District of Arkansas**
Appellees,	*	
v.	*	
Brad Butler, etc., et al,	*	(Filed Aug. 20, 1998)
Appellants.	*	

The court grants the appellees' motions for leave to file reply briefs.

The court grants the intervenor/appellants' motion for leave to file a supplemental memorandum.

The court grants in part the appellees' original motion for fees and costs. The court awards $219.03 in costs to the appellees, *see* 8th Cir. R. 39A(a), to be assessed only against defendants Butler, Burris, Looney, Allen, Kearney, and Alexander. *See Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989). The court denies in all other respects the appellees' original motion for fees and costs. *See Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), *aff'd*, 75 F. 3d 454 (9th Cir. 1996) (*per curiam*).

The court denies the appellees' supplemental motion for fees and costs. *See* 8th Cir. R. 39A(a).

Intervenor's motion for leave to file a brief in reply to appellees' response is denied as moot.

August 18, 1998

A true copy.

Attest: /s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

ARKANSAS RIGHT TO LIFE STATE POLITICAL ACTION COMMITTEE and David Sloan, Appellees,

v.

Brad BUTLER, In His Official Capacity as State Attorney for Benton County; Troy Burris, In His Official Capacity as Chairman and Member of the Arkansas Ethics Commission; Rita Looney, In Her Official Capacity as Member of the Arkansas Ethics Commission; Ben Allen, In His Official Capacity as Member of the Arkansas Ethics Commission; Jack Kearney, In His Official Capacity as Member of the Arkansas Ethics Commission; and Tom Alexander, In His Official Capacity as Member of the Arkansas Ethics Commission, Appellants/Defendants, Genevieve Stewart; Paul Kelly; Association of Community Organizations for Reform Now Political Action Committee; and Local 100, Service Employees International Union Political Action Committee, Intervenors as Defendants/Appellants.

Nos. 98-1215, 98-1218.

United States Court of Appeals,
Eighth Circuit.

Submitted April 13, 1998.

Decided June 4, 1998.

Brian Brooks, Little Rock, AR, argued (Shirley E. Guntharp, on the brief), for Appellants.

Glen J. Moramarco, New York City, argued, for Intervenor-Appellant.

James Bopp, Terre Haute, IN, argued (Robert J. Newmeyer, Dale L. Wilcox, David G. Nixon and Michael D. Holland, on the brief), for Appellees.

Before WOLLMAN, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

The Arkansas Right to Life State Political Action Committee brought this suit challenging the constitutionality of various provisions of a campaign finance reform measure approved by popular vote in Arkansas in 1996 and known as Initiated Act I. The district court entered partial summary judgment invalidating one of the provisions of Act I, *see Arkansas Right to Life State Political Action Committee v. Butler*, 983 F.Supp. 1209, 1213, 1236 (W.D.Ark.1997), and the defendants and the intervenors (as defendants) appeal. We affirm the judgment of the district court[1] and remand the case for further proceedings consistent with this opinion.

I.

While this appeal was pending, the plaintiffs filed two motions. They moved, first, to dismiss the appeal of the intervenors on the ground that it was untimely. It is undisputed that the primary defendants filed a timely notice of appeal on December 17, 1997, and that the intervenors filed a notice of appeal on December 29, 1997.

Fed. R.App. P. 4(a)(3) provides that if "one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed." Since December 29 is certainly

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[1] The Honorable H. Franklin Waters, United States District Judge for the Western District of Arkansas.

within fourteen days of December 17, we believe that the intervenors filed their notice within the relevant time limit.

II.

The plaintiffs also moved to dismiss the intervenors for lack of Article III standing. Intervenors, like any other party to a case, must meet the requirements of Article III standing to be eligible to litigate their claims in federal court: "While [Fed.R.Civ.P.] 24 [on intervention] promotes judicial economy by facilitating, where constitutionally permissible, the participation of interested parties in others' lawsuits, the fact remains that a federal case is a limited affair, and not everyone with an opinion is invited to attend." *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir.1996). Article III standing must exist throughout the litigation.

Given our holding on the merits below, however, there is no longer an active dispute in the present case before this court. Whether the intervenors have standing to litigate their remaining claims before the district court is a matter for that court to determine upon remand.

III.

In the district court, the defendants and the intervenors challenged the plaintiffs' standing to bring this case on the ground that the plaintiffs lacked the necessary "injury in fact," and the district court denied their motion to dismiss. *See Arkansas Right to Life State Political Action Committee v. Butler*, 972 F.Supp. 1187, 1189, 1192, 1194

(W.D.Ark.1997). Standing is, of course, a threshold issue in every case before a federal court: If a plaintiff lacks standing, he or she cannot invoke its jurisdiction. *See Boyle v. Anderson*, 68 F.3d 1093, 1100 (8th Cir.1995), *cert. denied*, 516 U.S. 1173, 116 S.Ct. 1266, 134 L.Ed.2d 214 (1996). In order to invoke the jurisdiction of a federal court, one must have suffered an "injury in fact," and such an injury must be concrete, particularized, and either actual or imminent. *Id.* at 1100-01. Vague and conclusory allegations of harm are insufficient to create standing. *See Renne v. Geary*, 501 U.S. 312, 316, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991); *see also id.* at 324, 111 S.Ct. 2331.

Plaintiffs, however, are not required to expose themselves to arrest or prosecution under a criminal statute in order to challenge a statute in federal court. *See New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8, 13 (1st Cir.1996). Instead, "[w]hen government action or inaction is challenged by a party who is a target or object of that action . . . 'there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.' " *Minnesota Citizens Concerned for Life v. Federal Election Commission*, 113 F.3d 129, 131 (8th Cir.1997), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

We believe that the district court properly concluded that the plaintiffs are a target or object of the prohibitions contained in Act I. The plaintiffs allege in their verified complaint that they "would like to make contributions in excess of $100 to the candidates enumerated in Arkansas

Code § 7-6-203(b)(1) and $300 to the candidates enumerated in Arkansas Code § 7-6-203(b)(2)." Unlike the plaintiffs in *Renne*, 501 U.S. at 322, 111 S.Ct. 2331, who did not allege an intention to engage in the proscribed conduct with sufficient specificity, the plaintiffs here have alleged a specific intent to pursue conduct in violation of the challenged statute. We believe therefore that the district court was correct in concluding that the plaintiffs had standing to challenge the provision of Act I in question in this case.

IV.

In a companion case, *Russell v. Burris*, 146 F.3d 563 (8th Cir.1998), we resolved the constitutional issue raised here. We declared the provision invalidated by the district court's summary judgment in this case to be unconstitutional and unenforceable. We therefore affirm the judgment of the district court and remand the case for further proceedings consistent with this opinion.

Ron RUSSELL, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee, Appellants,

v.

Troy BURRIS, In His Official Capacity as Chairperson of the Arkansas Ethics Commission; Rita Looney, In Her Official Capacity as a Member of the Arkansas Ethics Commission; Tom Alexander, In His Official Capacity as a Member of the Arkansas Ethics Commission; Ben Allen, In His Official Capacity as a Member of the Arkansas Ethics Commission; Jack Kearney, In His Official Capacity as a Member of the Arkansas Ethics Commission; and Citizens for Clean Government, Appellees.

American Civil Liberties Union of Arkansas, James Madison Center for Free Speech, Shrink Missouri Government PAC, and Zev David Fredman, Amici Curiae on Behalf of Appellants. Connecticut, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Montana, New Mexico, North Dakota, Utah, and Vermont, Amici Curiae on Behalf of Appellees.

Ron RUSSELL, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee, Appellees,

v.

Troy BURRIS, In His Official Capacity as Chairperson of the Arkansas Ethics Commission; Rita Looney, In Her Official Capacity as a Member of the Arkansas Ethics Commission; Tom Alexander, In His Official Capacity as a Member of the Arkansas Ethics Commission; Ben Allen, In His Official Capacity as a Member of the Arkansas Ethics Commission; and Jack Kearney, In His Official Capacity as a Member of the Arkansas Ethics

Commission, Appellants, Citizens for Clean Government, Intervenor as Defendant. James Madison Center for Free Speech, Shrink Missouri Government PAC, and Zev David Fredman, Amici Curiae on Behalf of Appellees. Connecticut, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Montana, New Mexico, North Dakota, Utah, and Vermont, Amici Curiae on Behalf of Appellants.

Ron RUSSELL, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee, Appellees,

v.

Troy BURRIS, In His Official Capacity as Chairperson of the Arkansas Ethics Commission; Candi Sue Russell, In Her Official Capacity as a Member of the Arkansas Ethics Commission; Marvin Delph, In His Official Capacity as a Member of the Arkansas Ethics Commission; Rita Looney, In Her Official Capacity as a Member of the Arkansas Ethics Commission; and Norton Wilson, In His Official Capacity as a Member of the Arkansas Ethics Commission, Defendants, Citizens for Clean Government, Appellant. James Madison Center for Free Speech, Shrink Missouri Government PAC, and Zev David Fredman, Amici Curiae on Behalf of Appellees.

Nos. 97-3922, 97-4033 and 97-4038.

United States Court of Appeals,
Eighth Circuit.

Submitted April 13, 1998.

Decided June 4, 1998.

Robert D. Smith, III, Little Rock, AR, argued, for Appellants.

Brian G. Brooks, Little Rock, AR, argued (Shirley E. Guntharp, on the brief), for Appellees.

Nancy Northup, New York City, argued (Burt Neuborne, Kenneth N. Weine, and Scott C. Trotter, on the brief), for Intervenor.

Before WOLLMAN, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

In 1996, the people of Arkansas, by voter initiative, approved a campaign finance reform measure entitled Initiated Act I. Prior to Act I, Arkansas law limited individuals and political action committees to contributions of $1,000 per candidate during each election cycle. Act I reduced the contribution limit to $300 for the offices of governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, and commissioner of state lands, *see* Ark.Code Ann. § 7-6-203(a), § 7-6-203(b), and to $100 for all other state public offices, *see* Ark.Code Ann. § 7-6-203(a)(1), § 7-6-203(b)(1).

Act I also created a special category of political action committee (PAC), *see* Ark.Code Ann. § 7-6-201(9), § 7-6-201(10), known as a small-donor PAC. *See* Ark.Code Ann. § 7-6-201(12). Under Act I, a small-donor PAC may accept no contribution larger than $25, *see* Ark.Code Ann. § 7-6-201(12)(B), and it may contribute no more than $2,500 per election to any candidate, *see* Ark.Code Ann. § 7-6-203(d). Act I authorized as well the creation of a campaign fund-raising entity known as an independent

expenditure committee. *See* Ark.Code Ann. § 7-6-201(14). An independent expenditure committee may, like any person, make unlimited independent expenditures (that is, ones not coordinated with a candidate) to advocate the election or defeat of a clearly identified candidate for office. *See* Ark.Code Ann. § 7-6-201(13), § 7-6-201(14). Such a committee, however, may accept no more than $500 from any person annually. *See* Ark.Code Ann. § 7-6-203(k). Finally, Act I authorized local governments to set reasonable limitations on fund-raising for campaigns for local offices. *See* Ark.Code Ann. § 7-6-224. Ron Russell, Kent Ingram, William Austin, and the Associated Industries of Arkansas Political Action Committee challenged each of these Act I provisions in the district court, as well as a pre-Act I provision limiting contributions to any one PAC to $200 annually, *see* Ark.Code Ann. § 7-6-201(9)(B).

Following a bench trial, the district court held that the contribution limits of $300 for certain statewide offices and of $100 for state judicial offices were unconstitutional because they violated the First Amendment's prohibition against limitations on the freedom of speech. *See Russell v. Burris*, 978 F.Supp. 1211, 1222, 1224, 1229 (E.D.Ark.1997). The trial court, however, upheld the $100 contribution limit as to all other offices and the $200 contribution limit to PACs. *Id.* at 1223, 1225, 1229. The trial court also held that the differential treatment for ordinary PACs and small-donor PACs did not violate the Fourteenth Amendment's equal protection clause. *Id.* at 1227, 1229. The trial court declined to reach the merits on the other two issues, finding that the plaintiffs did not have standing to contest the limit on contributions to

independent expenditure committees, *id.* at 1217, 1229, and that the provision authorizing relevant actions by local governments was not ripe for a constitutional challenge. *Id.* at 1217-18, 1229.

All parties appeal the rulings unfavorable to their litigating positions. We affirm in part and reverse in part.

I.

Standing is, of course, a threshold issue in every case before a federal court: If a plaintiff lacks standing, he or she cannot invoke the court's jurisdiction. *See Boyle v. Anderson*, 68 F.3d 1093, 1100 (8th Cir.1995), *cert. denied*, 516 U.S. 1173, 116 S.Ct. 1266, 134 L.Ed.2d 214 (1996). In order to invoke the jurisdiction of a federal court, one must meet three requirements. First, a plaintiff must have suffered an "injury in fact," and such an injury must be concrete, particularized, and either actual or imminent. *Id.* at 1100-01. Second, a would-be litigant must make out a causal connection between the alleged injury and the conduct challenged. *Id.* at 1100. Third, he or she must show that the injury is likely to be redressed by a favorable decision. *Id.*

The trial court determined that each of the plaintiffs had Article III standing as to all but one of their challenges, *see Russell*, 978 F.Supp. at 1217, and the defendants do not contest that determination here. The plaintiffs maintain, however, that the trial court erred in finding that they did not have Article III standing to challenge the provisions of Act I relating to independent expenditure committees.

The trial court found that the plaintiffs did not face a credible threat of present or future prosecution with respect to this part of their claim, and thus could show no actual or imminent "injury in fact," because none of them "could think of an independent expenditure committee to which they had contributed in the past or to which they planned to contribute." *Id.* Indeed, one plaintiff testified, "Well, in all honesty, I'd have to tell you it would take a stretch of my imagination to figure out why I'd want to contribute anything to an independent committee." Another simply testified that he did not know if he would ever contribute to such a committee.

We are mindful that where "plaintiffs allege an intention to engage in a course of conduct arguably affected with a constitutional interest which is clearly proscribed by statute, courts have found standing to challenge the statute, even absent a specific threat of enforcement." *United Food & Commercial Workers International Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir.1988). But the plaintiffs have not demonstrated any such intention: They have indicated neither that they would contribute to a specific independent expenditure committee nor that, but for the limitations of Act I, they would form an independent expenditure committee. Standing may not be predicated merely upon a conjectural or hypothetical injury or, as one of the plaintiffs here would have it, upon a stretch of the imagination. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). We therefore affirm the trial court's determination that the plaintiffs lacked standing to challenge the provisions relevant to independent expenditure committees.

II.

"Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 265, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). Government attempts to limit campaign contributions, therefore, are " ' "subject to the closest scrutiny." ' " *Carver v. Nixon*, 72 F.3d 633, 636 (8th Cir.1995), *cert. denied*, 518 U.S. 1033, 116 S.Ct. 2579, 135 L.Ed.2d 1094 (1996), quoting *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam), itself quoting *NAACP v. Alabama*, 357 U.S. 449, 461, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Under this standard, a significant interference with protected rights of political association may be sustained only when the state demonstrates a compelling interest and means closely drawn to avoid unnecessary abridgement of associational freedoms. *Carver*, 72 F.3d at 636.

Intervenor (as a defendant) Citizens for Clean Government (CCG) argues that we should apply a more lenient standard of review to the legislation in this case because Act I included not only contribution limits but also a public subsidy scheme. For this proposition, CCG relies upon the Supreme Court's ruling in *Buckley* that upheld a ban on general election campaign contributions to, and a limitation on general election campaign expenditures by, a presidential candidate who elected to receive a public subsidy. *See Buckley*, 424 U.S. at 85-109, 96 S.Ct. 612.

But the *Buckley* Court was clear that it was the optional nature of the contribution and expenditure limit scheme, not the subsidy, that rendered the scheme constitutionally permissible: "Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." *Id.* at 57 n. 65, 96 S.Ct. 612. Similarly, we recently upheld a voluntary campaign subsidy and limitation scheme in Minnesota because the scheme "presents candidates with an additional, optional campaign funding choice, the participation in which is voluntary." *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir.1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997). It is true that Act I provided a subsidy and limitation scheme, but unlike the schemes upheld in *Buckley* and *Rosenstiel*, Act I was imposed upon all candidates: Candidates do not have the power to opt out. We therefore decline this invitation to apply a standard of scrutiny to this case that is different from the one that we adopted in *Carver*.

CCG argues for a more lenient standard of review on the basis of two recent Supreme Court decisions as well, but neither of these authorities modifies the standard of review appropriate to this case. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 609, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (opinion of Breyer, J.), a case involving the application of federal campaign expenditure limits, three justices resorted to what CCG calls a weighing test, rather than strict scrutiny, to decide the case. *See id.* at 616, 618, 116 S.Ct. 2309. These justices described their approach as consistent with cases in which the Court "essentially

weighed the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views against a 'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption." *Id.* at 609, 116 S.Ct. 2309. This adjudicatory approach appears to us to be a restatement or reformulation, not a modification, of the Court's familiar strict scrutiny analysis.

We are aware that during the last term, in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 1370, 137 L.Ed.2d 589 (1997), the Supreme Court upheld an election regulation that barred a political party from choosing as its nominee a candidate already appearing on another party's ballot. The Court held that while regulations "imposing severe burdens on plaintiffs' rights must be narrowly tailored and [must] advance a compelling state interest," lesser burdens "trigger [a] less exacting review." *Id.* We believe, however, that restrictions on individual contributions to candidates and on candidates' amassing sufficient resources to run for office are more severe than the restrictions at issue in *Timmons*. Where the regulations impose severe burdens on First Amendment rights, as here, *Timmons* reiterates the Court's position that strict scrutiny applies.

We must therefore first determine what interest can be sufficiently compelling to permit the state to restrict First Amendment freedoms. The compelling state interest identified in *Buckley* was "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if

elected to office." *Buckley*, 424 U.S. at 25, 96 S.Ct. 612. The Court reiterated this position five years later, holding that "Buckley identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981) (emphasis omitted). Subsequently, the Court stated flatly that "[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985).

Only three years ago, we emphasized in *Carver*, 72 F.3d at 638-39, that the state may abridge political speech in the form of campaign contributions only to address the reality or perception of undue influence or corruption attributable to large contributions. We turn, then, to a consideration of whether the challenged provisions can pass muster under this standard.

III.

We consider first the provisions of Act I that limited direct contributions to candidates to $300 per election for certain statewide offices, *see* Ark.Code Ann. § 7-6-203(a), § 7-6-203(b), and to $100 per election for all other state offices, *see* Ark.Code Ann. § 7-6-203(a)(1), § 7-6-203(b)(1). The defendants must prove first that there is real or perceived undue influence or corruption attributable to

large political contributions in Arkansas, and then that these challenged provisions of Act I are narrowly tailored to address that reality or perception. We find that the defendants failed to carry their burden before the trial court.

We note that our review of the trial court's judgment may involve the review of some of the factual determinations that it made. The Supreme Court has instructed that, in cases involving the First Amendment, appellate courts are to make an independent examination of the whole record to ensure that their judgments do not constitute a forbidden intrusion on the right of free expression. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). But we are also mindful of Fed.R.Civ.P. 52(a), which provides that a trial court's factual findings are typically reviewed for clear error.

To reconcile these two legal propositions, we held last year that, in cases involving the First Amendment, we would review findings of noncritical facts for clear error, but would conduct an independent review of critical facts. *See Families Achieving Independence and Respect v. Nebraska Department of Social Services*, 111 F.3d 1408, 1411 (8th Cir.1997) (en banc). Accordingly, in the discussion that follows, we give due deference to the trial court's determination of noncritical facts, while we review independently those facts that we believe to be critical.

We begin with the observation that no defendant provided any credible evidence to the trial court of actual undue influence or corruption stemming from large contributions. We are left, then, to determine whether the

defendants proved that a reasonable person could perceive, on the basis of the evidence presented at trial, that such contributions make for undue influence or spawn corruption.

CCG presented proof at trial that was intended to demonstrate specific instances in which large contributions had given rise to the appearance of undue influence or corruption. Much of this proof focused on the introduction in the Arkansas legislature of a bill that would have prohibited local governments from regulating tobacco. The bill's sponsor, State Representative James Dietz, had received as much as $2,700 in contributions the previous year from various sources related to the tobacco industry, such as the Tobacco Institute. Many other supporters of the bill had apparently also received contributions from pro-tobacco sources. An opponent of the bill, State Representative Ted Thomas, testified that there was a "uniform" public perception of corruption associated with the bill's having been introduced and supported by legislators who had received contributions from tobacco interests.

Even assuming that Mr. Thomas was correct that there was a public perception of corruption, we must determine whether that public perception was reasonable, and whether that perception of corruption derived from the magnitude of the contributions to Mr. Dietz and other supporters of the bill. We believe, after an independent review of the facts presented to the trial court, that the defendants did not prove that the perception of corruption to which Mr. Thomas alluded was objectively reasonable. A newspaper article admitted into evidence

quoted Mr. Dietz as saying that he supported the preemption measure because he believed that one "ought to have the right to say what goes on inside his building as long as it's legal." That Mr. Dietz received political contributions from those whose interests he tended to support hardly indicates, on its own, any corruption.

The defendants provided no evidence at trial, for instance, that Mr. Dietz changed his position on the tobacco bill due to an intervening contribution. Nor did the defendants provide evidence that Mr. Dietz sought to conceal his contributions from tobacco-related sources. If it were reasonable to presume corruption from the fact that a public official voted in a way that pleased his contributors, legislatures could constitutionally ban all contributions except those from the public official's opponents, a patent absurdity. That would spell the end to the political right, protected by the First Amendment, to support a candidate of one's choice.

The defendants' objections to Mr. Dietz's activities are also, we believe, essentially unrelated to the size of the individual contributions that he received. The defendants did not provide evidence, such as that produced by the government in *Buckley*, of multi-million-dollar contributions to Mr. Dietz. Indeed, our review of the evidence presented to the trial court indicates that Mr. Dietz reported no individual contribution larger than $1,000 from any source, tobacco-related or otherwise. We believe that $1,000 is simply not a large enough sum of money to yield, of its own accord and without further evidence, a reasonable perception of undue influence or corruption.

The defendants essentially criticize Mr. Dietz for offering a bill favorable to interests from whom he had already accepted campaign contributions. The difficulty pointed to, then, seems to be the identity of the contributors and their subsequent interest in legislation rather than the size of their contributions. We note that even if Mr. Dietz had received twenty-seven individual contributions of $100 from various tobacco-related sources instead of a few somewhat larger contributions, the defendants could make the same criticism of his activities as they made here. We therefore conclude that the evidence that the defendants presented regarding the tobacco legislation does not permit a finding of a reasonable perception of corruption or undue influence due to large contributions.

The defendants also produced proof at trial that was related to contributions by lobbyists to State Representative Ode Maddox. In April, 1996, a group of lobbyists held a fund-raiser for Mr. Maddox at the Arkansas Poultry Federation in Little Rock. According to the trial court, at that event Mr. Maddox raised a total of more than $22,000 from various lobbyists, PACs, and corporations. Our independent review of the record shows that Mr. Maddox received no contribution in excess of $1,000 from any single source.

The record does not indicate any change in Mr. Maddox's political behavior following these donations, nor does it indicate that Mr. Maddox sought to conceal his contributions or their sources. Indeed, the defendants did not even demonstrate that Mr. Maddox voted in any particular fashion with respect to any relevant issues following the receipt of these donations. At bottom, the

defendants' complaint about Mr. Maddox's contributions is that they came from lobbyists who live outside his district and have business before his committee from time to time. But this complaint is not related to the size of the contributions made to Mr. Maddox, and thus does not satisfy the compelling state interest standard established in *Buckley* and *Carver*. We conclude, then, that the evidence that the defendants offered regarding Mr. Maddox's fund-raising practices does not permit a finding of a reasonable perception of corruption or undue influence stemming from large contributions.

The defendants also adduced proof at trial of contributions by "real estate interests" to members of the Little Rock municipal government. But, again, the defendants' declared interest in regulating these has to do with the identity of the contributor and that contributor's interests rather than with the size of individual contributions. According to records provided to the trial court, no member of the Little Rock municipal government received more than $1,000 from any so-called "real estate interest." The record does not indicate any change in any official's behavior following such contributions, nor did the defendants demonstrate that any official attempted to conceal the source of the contributions. The evidence instead shows that the "real estate interests" contributed to candidates who supported initiatives with which the contributors agreed – that is, the "real estate interests" appear to have chosen well which candidates to support.

We cannot say that this evidence is sufficient to establish that there could be a reasonable perception of corruption or undue influence due to large contributions. The defendants identify, instead, a concern that "real

estate interests" gave money to officials of a municipal government, and that those officials then voted on issues relevant to real estate. This concern, as we have said above, is not related specifically to the size of the contributions, and thus is outside the scope of the compelling state interest as defined by *Buckley* and *Carver*.

We also believe that the candidate contribution limits set forth in Act I are too low to allow meaningful participation in protected speech and association. *See Carver*, 72 F.3d at 641-42. In *Buckley*, 424 U.S. at 20-35, 96 S.Ct. 612, the Supreme Court approved a $1,000 contribution limit as a narrowly tailored means to address the problem of large campaign contributions. As we noted in *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir.1994), *cert. denied*, 513 U.S. 1127, 115 S.Ct. 936, 130 L.Ed.2d 881 (1995), inflation has eroded approximately 60 percent of the value of a dollar since 1976. A $1,000 contribution in 1976 would thus be worth about the same as a $2,500 contribution today. We recognize that the contribution limit upheld in *Buckley* does not constitute a constitutional minimum and that we may not fine-tune the contribution limits established by Act I. *See Carver*, 72 F.3d at 641. We must, however, invalidate the contribution limitations if they are different in kind from those that *Buckley* upheld. *See id.*

The provisions of Act I challenged here limited contributions to a candidate to only $100 or $300, depending upon the office. *See* Ark.Code Ann. § 7-6-203(a), § 7-6-203(b). The limits prescribed by Act I, then, are (adjusted for inflation) approximately 4 percent or 12 percent, respectively, of the limit upheld in *Buckley*. In *Day*, 34 F.3d at 1366, we concluded that a limitation of

$100, or 4 percent of the inflation-adjusted limit upheld in *Buckley*, constituted a difference in kind from the limit upheld in *Buckley*. In *Carver*, 72 F.3d at 641-42, we held that contribution limitations of $100 or $300 per election cycle (2 percent or 6 percent, respectively, of the limit approved in *Buckley*) were "dramatically lower," and thus different in kind, from the limit upheld in *Buckley*. We believe that the limitations in question here are similarly dramatically lower than, and different in kind from, the limits approved in *Buckley*, and thus are unconstitutionally low.

We note, finally, that even if there were a compelling state interest to prevent the perception of corruption or undue influence due to any of the various concerns identified here by the defendants – that is, supporting tobacco legislation, accepting contributions from those appearing before or having interests before one's legislative committee, accepting contributions from supporters outside one's district, or the like – Act I was not narrowly tailored to address them. As we have already noted, "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Massachusetts Citizens for Life*, 479 U.S. at 265, 107 S.Ct. 616. Act I, however, is at once both overinclusive and underinclusive, by limiting the free speech of all who would contribute without addressing the specific concerns identified.

IV.

The plaintiffs challenged two provisions relating to the activities of political action committees. The first of these was a provision, enacted in 1990, that prohibited persons from giving more than $200 each year to any one political action committee. *See* Ark.Code Ann. § 7-6-201(9)(B).

State-enforced limits on contributions to political action committees stifle "not only free political speech, but also free political association," and are reviewed according to a strict scrutiny standard. *Day,* 34 F.3d at 1365. We must therefore determine whether the defendants demonstrated that the provision was narrowly tailored to address the compelling state interest in avoiding corruption or the appearance of corruption that stems from large contributions.

We hold that this provision, like the provision that we invalidated in *Day,* is not narrowly tailored to serve a compelling state interest, because the annual limit is so low as to be different in kind from the limit approved in *Buckley. See id.* at 1366. In *Day,* we noted that a $100 limit (in 1994 dollars) for contributions to political action committees was, adjusted for inflation, equal to approximately 4 percent of the contribution limit upheld in *Buckley. Id.* Thus, a $200 limit (in 1998 dollars) is equal to no more than 8 percent of the contribution limit approved in *Buckley.* That limit is also less than 5 percent, even before any adjustment for inflation, of the $5,000 limitation on contributions to PACs approved by the Supreme Court in *California Medical Association v. Federal Election*

Commission, 453 U.S. 182, 195-99, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981) (plurality opinion).

There is also less of a danger of quid pro quo corruption, such as the sort that one might presume from large contributions given directly to candidates, when a contribution is given to a PAC that does not itself wield legislative power. Cf. *Day*, 34 F.3d at 1365. We believe that a $200 limit (in 1998 dollars) will significantly impair the ability of individuals to exercise their political rights. The limit is simply too low to allow for appropriately robust participation in protected political speech and association, and thus violates the protections for free political speech and free association that the First Amendment affords.

The plaintiffs also challenged the provision in Act I that permitted small-donor political action committees to give as much as $2,500 to a candidate (in contrast to the lower limits applicable to contributions by ordinary political action committees). *See* Ark.Code Ann. § 7-6-203(d); *see also* Ark.Code Ann. § 7-6-201(a), § 7-6-201(b). We believe that such differential treatment must be evaluated according to a strict scrutiny standard. "Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990).

The defendants argue that the differential treatment of ordinary and small-donor PACs is justified because of the difference in regulations as to their method of raising

money. The only compelling government interest that might permit this infringement of First Amendment rights, as we have said, is preventing the reality or perception of undue influence or corruption that might arise from large contributions. As the Supreme Court has held, "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Buckley*, 424 U.S. at 26, 96 S.Ct. 612. Ostensibly to alleviate this potential for corruption, Act I limited individuals and ordinary PACs to giving $300 to certain candidates and $100 to others (although we note that our holding above returns these limits to their pre-Act I limits of $1,000). *See* Ark.Code Ann. § 7-6-201(a), § 7-6-201(b). Act I allowed small-donor PACs, however, to give $2,500 to any candidate. *See* Ark.Code Ann. § 7-6-203(d). This differential treatment is said to be acceptable because small-donor PACs themselves receive that money in contributions of $25 or less, *see* Ark.Code Ann. § 7-6-201(12)(B).

This explanation, however, is manifestly flawed, because it focuses on the source of the funds given to a PAC rather than on the entity from which the candidate receives the funds. Because a small-donor PAC receives small donations, it is true that it is unlikely that any one contributor to a small-donor PAC will be able to control that PAC. Act I, however, ignored the possibility that the small-donor PAC itself will seek to control a given candidate. A $2,500 contribution would be even more likely to exacerbate this difficulty than the $1,000 contribution limit applicable to most other contributors. Indeed, if any

contribution is likely to give rise to a reasonable perception of undue influence or corruption, it would be one from an entity permitted to contribute two-and-a-half times the amount that most others are allowed to contribute. The small-donor PAC provision is not, then, narrowly tailored to serve the compelling government interest of combating the reality or perception of undue influence or corruption.

We reject the defendants' argument that the plaintiffs (namely, three individuals and a political action committee) may not assert this equal protection argument because they are not burdened to a greater extent by this provision than small-donor PACs are. Ordinary PACs may, it is true, raise more money per contribution than a small-donor PAC, but the issue is their ability to speak freely by contributing money to candidates for office. Insofar as that freedom is at issue, the ordinary PACs are burdened more than the small-donor PACs, because ordinary PACs may donate only the amount that individuals may donate, while small-donor PACs may donate $2,500. We believe, then, that the plaintiffs here meet the requirements set forth in *California Medical Association*, 453 U.S. at 200, 101 S.Ct. 2712.

V.

The plaintiffs also challenged the constitutionality of Ark.Code Ann. § 7-6-224. This provision states only that local governments "shall have the authority to establish reasonable limitations" on campaign contributions and expenditures, and appears to be simply an allocation by the state of Arkansas of certain of its plenary powers to

local governments: It does not set any specific limits on campaign contributions or expenditures, and thus cannot restrict the First Amendment freedoms of any person or entity seeking to contribute to or spend the revenues of a political campaign. Were a local government to exercise the power granted it by § 7-6-224, its action might then be challenged in the same manner as the actions of the defendants were challenged in this suit. But no such action has yet been taken and brought to the attention of a court. Ark.Code Ann. § 7-6-224 thus does not present a federal constitutional controversy that is ripe for adjudication at this time.

VI.

Those provisions of the Arkansas statutes in conflict with our analysis above are unconstitutional and unenforceable. We must now determine whether the invalid provisions of Act I may be severed from the remainder of its provisions.

Severability is a matter of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996) (per curiam). The Supreme Court of Arkansas looks to two considerations to determine severability: "(1) whether a single purpose is meant to be accomplished by the act; and (2) whether the sections of the act are interrelated and dependent upon each other." *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349, 357 (1994). The court provided further guidance, moreover, in its observation that "it is important whether the portion of the act remaining is complete in itself and capable of being executed wholly independent of that which was rejected." *Id.*

at 358. A severability clause, such as the one provided in Act I, is relevant but not determinative of whether individual provisions of the act will be considered severable. *Id.*

Applying the principles set forth in *U.S. Term Limits*, we find no single purpose behind Act I with which our ruling could interfere. Act I provided for a series of campaign finance reforms, including the independent expenditure committee and certain tax provisions, that remain unaffected by the outcome of this case. We can find no reason not to honor the intent of the drafters of Act I that, to the extent possible, its various provisions should stand on their own.

VII.

We therefore affirm in part and reverse in part the judgment of the trial court. We remand the case to the district court for the entry of declaratory and injunctive relief consistent with this opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 98-1215/1218WAF

Arkansas Right to Life Political Action Committee; David Sloan, Appellees, v. Brad Butler, et al, Appellants.	* * * * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas

The suggestion for rehearing en banc is denied. Judge Richard S. Arnold would grant the suggestion.

The petition for rehearing by the panel is also denied.

September 29, 1998

Ordered Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3922/4033/4038

Ron Russell, et al., Appellants,	*	
vs.	*	Appeals from the United States District Court for the Eastern District of Arkansas
Troy Burris, et al, Appellees.	*	

The court grants the motion of appellees Burris, Looney, Alexander, Allen, and Kearney for leave to file late objections to the appellants' motion for fees and costs.

The court directs the clerk to file the objections of appellee Citizens for Clean Government to the appellants' motion for fees and costs.

The court directs the clerk to file the appellants' reply brief.

The court grants in part the appellants' motion for fees and costs. The court awards $449.33 in costs to the appellants, *see* 8th Cir. R. 39A(a) and *Miller-Wohl Company, Inc. v. Commissioner of Labor and Industry*, 694 F.2d 203 (9th Cir. 1982), *see also United States v. State of Michigan*, 940 F.2d 143 (6th Cir. 1991), and *Morales v. Turman*, 820 F.2d 728 (5th Cir. 1987), to be assessed only against defendants Burris, Looney, Alexander, Allen, Kearney, Russell, Delph, and Wilson. *See Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989). The court

denies in all other respects the appellants' motion for fees and costs. *See Thorsted v. Gregoire*, 841 F.Supp. 1068 (W.D. Wash. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996) (*per curiam*).

August 17, 1998

Ordered Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit